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In the Supreme Court
of the United States

No. 75-1549

JAMES N. SINCLAIR, et al,
Petitioners,

v.

CHARLES E. WILLIAMS,
Respondent.

JAMES N. SINCLAIR, et al,
Petitioners,

v.

DAN R. CARLSON & FRANK YAZZOLINO,
Respondents.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

BEN T. GRAY
1300 S. W. Fifth Avenue
Portland, Oregon 97201
Telephone (503) 224-8410
Attorney for Respondents

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5-76

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Petitioners' "Statement of the Case" is grossly misleading and in part incorrect.

The statement is incorrect, when it asserts that the District Court refused to certify a class. The District Court granted class designation in the Williams case on April 12, 1972, acting through the Honorable Alfred T. Goodwin, Circuit Court Judge, sitting as a District Court Judge by designation.

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This case commenced when Williams filed his class action complaint on August 19, 1971, and shortly thereafter asked for a Rule 23 class action designation. Judge Goodwin handled the case during the first nine months after it was filed, the period of greatest activity. During this time, numerous motions were filed, testing the law of the case. It was during this period that Judge Goodwin, in a carefully considered order, granted Williams two sub-classes, on April 12, 1972.[1] A few days later, on May 1, 1972, he denied a defendant's motion to reconsider his order.

Judge Goodwin, in his order, outlined his findings for class representation. Some 2,700 people were mailed notification of their class membership, at plaintiff's expense.

On August 17, 1972, plaintiffs Carlson and Yazzolino filed their class action complaint, for the reason that they were not included in the two sub-classes outlined by Judge Goodwin. The only difference between Williams and Carlson-Yazzolino is that Carlson-Yazzolino represent two additional sub-classes.

The Honorable Gus J. Solomon, District Court Judge, revoked the Williams classes on January 30, 1973, and disallowed the Carlson-Yazzolino classes. In doing so, Judge Solomon did not review or alter any of the findings made by Judge Goodwin.

Petitioners state that Williams admitted in his deposition that he did not rely upon and was not in-

[1] Appendix, pp. A-1, A-2.

fluenced by the prospectus in connection with his purchase. This is patently untrue. In their argument before Judge Solomon, defendants made this assertion, and Judge Solomon apparently made a good faith finding of such a fact, since it appears in his order. But, it is contrary to the record, since Williams most certainly read the prospectus; in his deposition, he states so time and again. In fact, he spent 30 minutes reading it. He was so impressed by it, he felt the company was doing him a favor in allowing him to buy more stock.

Petitioners refer to the fact finding of Judge Solomon, in his order of January 30, 1973, to the effect that defendant directors and officers admitted at the annual shareholders' meeting of October 20, 1969, that certain purchase orders for data processing equipment were not "firm" orders. In doing so, petitioners imply that the record that went to the Circuit Court of Appeals dealt only with the minor impropriety of an admission to stockholders, that the April prospectus was inaccurate in its claim of "firm" purchase back orders. Such is a seriously deficient impression. In fact, the "Statement of the Case" should have included some mention of the voluminous record that was forwarded to the Circuit Court of Appeals. This record included minutes of directors' meetings, depositions taken of defendant directors, and sworn affidavits. This record tends to support, without contradiction, many other factual matters, other than those mentioned in Judge Solomon's opinions, that were considered by the Cir-

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cuit Court of Appeals. A few bear mentioning: Defendants published in April, 1969, an enthusiastic $3 million prospectus, the third in a two year period, promising a mobile data processing product ready to market, boasting of over $1 million in back orders, when, in fact, the company was still experimenting and never ever produced a product, and, in fact, had no legitimate orders whatsoever. Forged "orders" and the bold assertion of a proven product that directors knew, and, when deposed, admitted was nothing more than an "idea," were only the two gawdiest of a steady stream of misleading information made to the public. Nevertheless, after having discovered that there were no back orders at all, the directors first held a directors' meeting and cautioned each other about the danger of telling shareholders the truth about the company, and then appeared at the annual shareholders' meeting in October, 1969, gave equivocal answers to direct questions on these subjects from shareholders, and failed to alert shareholders to the fact that (1) there were no back orders at all, "firm" or otherwise, and (2) there was, in fact, no product for sale.

Petitioners state that defendants paid certain monies into Court as a compromise to plaintiffs' claim. Petitioners fail to mention that no provision was made to inform the class of the proposed settlement, by the Court, though requested by plaintiffs, and mandated by Rule 23(e).

There was no compromise settlement. In fact, the amount paid into Court by defendants did not include

plaintiff's costs, or any provision for attorney fees, and ignored plaintiffs' claim for punitive damages.

I. The Circuit Court Affirmed Judge Goodwin's Findings in Granting Class Designation

The Honorable Alfred T. Goodwin, Circuit Court Judge, sitting as a District Court Judge by designation, made specific findings of class designation.[2] His order established the law of the case, and his decision should not be overturned by another judge later, in the absence of a showing of some change in the law of the case and a material reason for doing so. *Kempe* v. *U.S.*, 160 F.2d 406 (C.C.A. Iowa, 1947) cert. den. 331 U.S. 843; *GAF Corp.* v. *Circle Floor Co.*, 329 F. Supp. 823 (D.C. N.Y. 1971) affirmed at 463 F.2d 752 (2d Cir.); *Robb* v. *Sales*, 54 F.R.D. 196 (D.C. Pa. 1972).

No change had occurred in the law of the case on January 30, 1973, when Judge Solomon, acting sua sponte, reversed Judge Goodwin's prior order and revoked the class action designation in *Williams*.

II. The Ninth Circuit Reviewed the Entire Record on Reliance and Causation

The Ninth Circuit was not confined to a review of one item of evidence, i.e., the Williams deposition. Though plaintiff claims that a reading of the deposition points to reliance, and defendants claim the opposite, the Ninth Circuit could ignore this contentious area altogether. The Ninth Circuit had before it, for

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[2] Appendix, p. A-1.

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review, not the sufficiency of the evidence after a trial on the merits of the case, but the sufficiency of the allegations of plaintiffs' complaint for purposes of class designation.

Plaintiffs have alleged a common course of conduct consisting of the dissemination of a stream of false and misleading information, coupled with nondisclosure of the falsity thereof, over a period of time from 1967 through 1971. This deception, directed against all class members alike, was accomplished by standardized, printed material: prospectuses, press releases and reports to stockholders.

The Ninth Circuit agreed with Judge Goodwin that plaintiffs' complaint, together with the record on appeal, made the case ideally suited for class designation. A potential disagreement, at the time of trial, over the interpretation of one item of evidence, the Williams deposition, doesn't change the present broader decision of whether a class is or is not the better way to proceed.

III. Class Action Plaintiffs Cannot Ignore Their Fiduciary Duties to the Class.

Defendants have the right to confess judgment and pay into Court the amount of plaintiffs' claims. But plaintiffs are not obliged to draw down the monies deposited (1) when no provision is made to inform class members pursuant to Rule 23(e) and (2) when the amounts are disputed.

The Ninth Circuit had little choice but to reverse

on this issue when it learned that, though requested by plaintiffs, no provision was made to notify the class which had been previously designated and notified by Judge Goodwin, that there had been no hearing regarding disputed costs, that there had been no hearing regarding attorney fees, and that one of plaintiffs' causes of action was being ignored.

CONCLUSION

The Ninth Circuit correctly decided that these cases are appropriate for class designation. Certiorari should be denied.

DATED May 24, 1976.

Respectfully submitted,

BEN T. GRAY
Attorney for Respondents
Charles E. Williams, Dan R. Carlson, Frank Yazzolino

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APPENDIX

1. Judge Goodwin's Order Designating Class Action, filed April 12, 1972.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CHARLES E. WILLIAMS,

Plaintiff,

v.

JAMES N. SINCLAIR, et al,

Defendants.

Civil No. 71-577

ORDER DESIGNATING CLASS ACTION

Plaintiff's motion to maintain a class action was denied by this court on December 9, 1971. On March 1, 1972, plaintiff moved this court to reconsider its earlier order, and, upon reconsideration, the court finds, pursuant to Fed. R. Civ. P. 23(a), (b) (3), that the representative plaintiff will fairly and adequately represent the interests of the class, that questions of law or fact common to the members of the class predominate over questions affecting only individual members, and that a class action is superior to other available methods of adjudicating this controversy.

IT IS THEREFORE ORDERED that the above-entitled action proceed as a class action. The class shall be composed of those persons who owned securities of the Data Pacific Corporation as of March 17,

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1969, and who, on or before May 1, 1969, exercised the warrants issued by the Corporation to existing shareholders. The class shall also include those persons who owned Data Pacific securities on the date the April 1969 prospectus was released and who retained such securities until August 19, 1971, the date this action was filed, or who, prior to August 19, 1971, but after May 1, 1969, sold such securities at a financial loss.

IT IS FURTHER ORDERED that plaintiff send notice to all members of the class in a form of notice to be approved by the court, and that plaintiff bear the costs of such notice.

DATED this 12th day of April, 1972.

/s/ *Alfred T. Goodwin*
United States Circuit Judge
sitting as District Judge
by designation